United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ Affidavit of Mailing

76-1032

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P/S

To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1032

UNITED STATES OF AMERICA,

Appellee,

—*against*—

CLIFFORD ZEIGLER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
Assistant United States Attorney,
Of Counsel.

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Preliminary Statement

Clifford Zeigler appeals from a judgment of the United States District Court for the Eastern District of New York, entered January 8, 1976, convicting him, after a jury trial before the Honorable Thomas C. Platt, on two counts of possessing with the intent to distribute and distributing approximately 47 grams of heroin in violation of Title 21, United States Code, Section 841(a)(1).

Appellant was sentenced to eight years imprisonment on each count, to run concurrently, and to a special parole term of six years. He is free on bail pending appeal.

On appeal, appellant raises two points: he challenges (1) the sufficiency of the evidence in support of the conviction; and (2) the District Court's refusal to give a requested charge on the defense of entrapment.

Statement of Facts

On October 3, 1973, agents of the Drug Enforcement Administration (hereinafter DEA) received information from an informant, one David Livingston, that appellant was trafficking in narcotics in the Eastern District of New York. Livingston indicated that he would be able to introduce an agent to appellant for the purpose of purchasing heroin. (139-140).[1]

At approximately 7:30 P.M. that same evening, special agent Garfield Hammonds, while operating in an undercover capacity, was introduced to appellant in an empty after-hours bar then run by Livingston at 347 Sumner Avenue in Brooklyn, New York. At the time of the meeting appellant, who was introduced under the alias "Chuck", was accompanied by an unidentified black male.

The undisputed testimony as to the ensuing conversation is as follows. Appellant asked Hammonds, "[w]hat can I do for you?" (64-65). In response, the undercover agent stated that he was "interested in purchasing two ounces of heroin" (20, 65). Zeigler immediately replied that he "could furnish" the two ounces at a price of $1,400.00 an ounce. Appellant further stated that the quality of the heroin would be such that it would "take a five-cut", and that Hammonds could return it if he was dissatisfied. (20-21). He indicated that Hammonds would have to advance money, and that he would deliver the package (22).

Shortly thereafter, appellant left the premises with Agent Hammonds, entered as undercover government vehicle, and travelled a few blocks to the vicinity of 203

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[1] Unless otherwise specified, parenthetical page references are to the trial transcript.

Macon Street. Zeigler then told Agent Hammonds that he could not take him to his source, but that Hammonds would have to wait while appellant obtained the heroin (27). Hammonds counted out $2,800.00 in official advance funds and turned it over to appellant, after which appellant departed the area.

Approximately fifty minutes later, Zeigler returned without the heroin, stating that he was unable to contact his source of supply (28). Appellant returned the $2,800.00 to Agent Hammonds, and after making one further attempt to contact his source at the Tip-Top Bar on Halsey Street, he informed the agent that his source had gone to Manhattan and would return later. Agent Hammonds returned to the after-hours bar at 347 Sumner Avenue and had no further contact with appellant that evening.

At approximately 1:30 A.M. on the morning of October 5, 1973, Agent Hammonds again met with appellant in the informant's after-hours bar. They renegotiated the same deal (31) and proceeded back to the vicinity of 203 Macon Street. Agent Hammonds gave Zeigler $2,800.00 and appellant departed the area.

A surveillance team of DEA agents kept appellant under observation thereafter. He was observed proceeding down Tomkins Avenue one block to Halsey Street, which runs parallel to Macon Street. There he made several telephone calls from a public phone booth. (107-110). Approximately two hours later, after entering several premises on Halsey Street, including the Tip-Top Bar, appellant returned to the area of 203 Macon Street, where Agent Hammonds was waiting in his undercover vehicle. At that time, appellant was accompanied by the unidentified black male who had been present at the Hammonds-Zeigler introduction on October 3rd, and by

an unidentified black female.[2] About a half a block from the car, and prior to entering Hammonds' view, appellant and his accomplices stopped for a brief conversation (136). Zeigler then crossed Tomkins Avenue and entered a park from which he could observe Hammonds' vehicle (id). As he did so, his two accomplices, the unidentified male and female, approached the car (137).

At approximately 3:40 A.M., the unidentified male and female arrived at Hammonds' car. The male told Agent Hammonds that "Chuck had sent him with the package" (33, 75). Upon entering the vehicle the unknown male produced a brown paper bag containing a quantity of white powder, wrapped in aluminum. He told Hammonds that it was "dynamite" and would "take a five-cut" (43, 78). After a few brief exchanges, the male and female departed Hammonds' vehicle and proceeded down Tomkins Avenue, where they were observed by surveillance agents to rejoin the appellant. The three of them then departed the area together (137).

The substance which Agent Hammonds had purchased from appellant was subsequently analyzed at the DEA laboratory and was found to be approximately 47 grams of heroin at 19.6 percent strength. At trial, appellant stipulated to the chemist's analysis (198).

On January 24, 1974, Agent Hammonds met once again with appellant. The meeting began at the Tip-Top Bar, where Hammonds and Zeigler negotiated a second two-ounce sale of heroin. Zeigler agreed to supply the heroin for another $2,800.00. After visits to a

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[2] After his arrest on January 24, 1974, appellant was asked to identify the male and female who had delivered the heroin on October 5, 1973. Appellant would not reveal their names saying only that "they acted on the basis of his instructions to them to deliver the package . . . ." (102).

number of premises and several phone calls, appellant informed Hammonds that the heroin would be delivered at Zeigler's apartment at 610 Hegeman Street (49-50). On the way to that address, however, Hammonds and Zeigler were stopped by local police for a traffic violation. Zeigler at that time observed Hammonds' DEA credentials, and the agent was forced to arrest him without completing the additional heroin purchase. (49-50).

ARGUMENT

POINT I

Appellant's conviction is supported by sufficient evidence and should be affirmed.

Appellant initially challenges the sufficiency of the evidence in support of his conviction for possessing and distributing heroin. Strongly suggesting the singular culpability of the unidentified black male who actually delivered the two ounces of heroin to Agent Hammonds on October 5, 1973, appellant argues that the evidence fails to establish that he himself was ever observed in possession of heroin. Moreover he argues that although he accepted $2,800.00 for the purpose of supplying the undercover agent with two ounces of heroin, which was in fact delivered, his conduct was merely "prefatory to the sale"; he contends that since he did not "collaborate" with the seller, his conviction cannot be sustained. Citing *United States* v. *Moses*, 220 F.2d 166, 168 (3d Cir. 1955). Finally, appellant suggests that the evidence was insufficient to find him guilty of aiding and abetting the unlawful distribution of heroin. Again shifting guilt to the unidentified male who delivered the heroin, appellant argues that he "did not associate himself with the unknown man's venture; did not participate in it as some-

thing that he wished brought about; nor did he seek by his actions to make it succeed." (App. Br. at p. 10).

Viewing the evidence as it must be viewed, in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *McCarthy* v. *United States*, 473 F.2d 300, 302 (2d Cir. 1972), appellant's sufficiency arguments are wholly without merit. While such arguments might have been raised before the trier of the facts, they are not properly raised on appeal. The jury, in returning a verdict of guilty, rejected each of appellant's arguments. Since the evidence before the jury was sufficient to permit the necessary inferences in support of the verdict, appellant's sufficiency arguments must be rejected.

As noted above, Agent Hammonds testified that he met with appellant on three occasions for the purpose of purchasing heroin. On each of those occasions, appellant represented himself as being capable of supplying heroin in substantial quantities for $1,400 an ounce. Moreover, appellant vouched for the quality of the heroin, stating that it would "take a five-cut", and that Hammonds could return it if dissatisfied.

At approximately 1:30 A.M. on October 5, 1973, appellant accepted $2,800 in currency for the express purpose of supplying the heroin which is the subject of the charges herein. For the next two hours he was variously observed making phone calls and moving from one location to another, presumably in search of his supplier. At approximately 3:40 A.M. he surreptitiously accompanied the unidentified male and female to the vicinity of Tomkins and Marion Streets where he had left Agent Hammonds waiting. As his two accomplices approached the undercover vehicle and delivered the "package from

Chuck," appellant lurked in a park a short distance away, overseeing the operation. Immediately after the delivery, Ziegler rejoined his accomplices and the three departed the area together. When questioned after his arrest about the identities of the unknown black male and unknown black female, Zeigler declined to identify or otherwise involve them, stating that they had merely followed his instructions to deliver the package. (101-102).

Appellant's reliance upon *United States* v. *Moses*, *supra*, 220 F.2d 166 (3d Cir. 1955) is misplaced. There the appellant, a drug addict, made an introduction to her supplier at the behest of two undercover agents. After vouching for the agents as individuals with whom she was familiar, Marie Moses played no further rule in the drug transaction. She did not participate in the negotiations, nor was she present at subsequent meetings when the monies and drugs were transferred. The *Moses* court found that there was no evidence that Marie Moses was anything more than a customer of the supplier—that she had no relationship to the illicit business. In overturning Moses conviction for abiding and abetting the illegal drug sale the Court stated that her introduction was merely "prefatory to the sale", and that she did not "collaborate" with the seller. There was no evidence that Marie Moses "was associated in any way with the enterprise of the seller." 220 F.2d at 168.

Appellant Zeigler stands in quite a different position, however. Unlike Marie Moses, he was significantly involved in the illicit transaction. He negotiated the terms himself and went to great lengths to produce the heroin for his buyer. He vouched for the quality of the drugs, guaranteeing the return of Hammonds' money if he were dissatisfied. And, he accepted $2,800 for the express purpose of selling two ounces of heroin. Finally, appellant was present in the area at the time of the delivery of the drugs, in what the jury could reasonably infer was a supervisory role. Unlike *Moses*, the

facts in this case indicate that, if he was not the prime mover in the Oct. 5, 1973 heroin sale, Clifford Zeigler, "associate[d] himself with the venture, . . . participate[d] in it as in something that he wished to bring about, [and sought] by his actions to make it succeed." *Nye and Nissen* v. *United States*, 336 U.S. 613, 619 (1949); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, *J.*). At the very least, then, the evidence overwhelmingly supports the conclusion that appellant aided and abetted the heroin transaction.

POINT II

The district court properly denied appellant's request for an entrapment charge.

Appellant next contends that the District Court committed reversible error in failing to charge the jury as to the defense of entrapment. Relying upon *United States* v. *Anglada*, 524 F.2d 296 (2d Cir. 1975) and *United States* v. *Licursi*, 525 F.2d 1164 (2d Cir. 1975), appellant argues that the evidence adequately established that his commission of the crimes charged was induced by government agents; and he further claims that the government's evidence failed to establish a predisposition on his part to commit such crimes. Accordingly, appellant contends, the issue of entrapment should have been submitted to the jury.

Here again, an examination of the trial record, in light of the prevailing law on the entrapment defense, reveals appellant's arguments to be unfounded.

As appellant correctly recognized, entitlement to an entrapment charge is dependent upon a bifurcated test, initially established by Judge Learned Hand in *United States* v. *Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1951).

> "[T]wo questions of fact arise: (1) did the agent induce the accused to commit the offence charged

> in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it."

The weight and burden of proof as to each prong of that test has recently been the subject of considerable analysis by this Court. *See United States* v. *Riley*, 363 F.2d 955 (2d Cir. 1966); *United States* v. *Miley*, 513 F.2d 1191, 1202 (2d Cir. 1975); *United States* v. *Anglada*, 524 F.2d 296 (2d Cir. 1975); *United States* v. *Licursi*, 525 F.2d 1164 (2d Cir. 1975); *United States* v. *Reed*, 526 F.2d 740 (2d Cir. 1975).

It is now well established that the defendant has the burden of showing by "some evidence", quantitatively defined as "relatively slight", that a government agent or informant initiated or induced the commission of the crime—i.e. that the government rather than the defendant, solicited, proposed, initiated, broached or suggested the proposed crime. *United States* v. *Licursi*, *supra*, 525 F.2d at 1168.

Government inducement alone, however, does not entitle the defendant to an entrapment charge. Where the government establishes by substantial evidence that the defendant had a predisposition to commit the offense, the Court need not submit the entrapment defense to the jury. Such propensity may be shown by:

> "(1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged, as evidenced by the accused's ready response to the inducement."

United States v. *Viviano*, 437 F.2d 295, 299, (2d Cir.), *cert. denied*, 402 U.S. 983 (1971); *United States* v. *Anglada*, *supra*, 524 F.2d at 299. Once the Government has established evidence of the defendant's propensity—*i.e.* that he was "ready and willing without persuasion" and was "awaiting any propitious opportunity to commit the offense"—then the defendant has the burden of challenging or contradicting that evidence before the issue will be submitted to the jury. *United States* v. *Licursi*, *supra*, 525 F.2d at 1168; *United States* v. *Anglada*, *supra*, 524 F.2d at 298-299.

In the instant case, the appellant fails on both prongs of the bifurcated test. As the District Court stated, the record is devoid of any evidence that appellant was induced by government agents to commit the crimes charged. On the contrary, the undisputed testimony is that upon their introduction, Zeigler, who had been identified to Drug Enforcement Administration agents as a narcotics trafficker, asked undercover Agent Hammonds, "what can I do for you." (64-65). Hammonds, in response, said he "was interested in purchasing two ounces of heroin" (20). Zeigler immediately replied that he "could furnish" the two ounces for "1,400 an ounce". He said the quality would be such that it would "take a five-cut" (id), and that it could be returned if Hammonds were not satisfied (21). Appellant did not contradict this testimony, or otherwise elicit any evidence that he was induced by either Hammonds or the informant to sell the two ounces of heroin in question.[3]

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[3] Appellant did not take the stand, nor did he attempt to produce the informant, David Livingston, who the record indicates, was a relative of his. Accordingly, there is no evidence in the record as to what, if any, conversations appellant might have had with the informant prior to the introduction of Agent Hammonds; and appellant cannot imply that the informant in any way induced the sale.

Assuming, *arguendo*, that the expression of interest on the part of the agent constituted an "inducement", the defendant would fail, in any event, based on the second prong of the bifurcated test. The undisputed, uncontradicted evidence overwhelmingly supports the District Court's finding of predisposition on the part of Zeigler. Unlike *Anglada, supra*, appellant was not subject of any pressure or persuasion by a government representative. *See Licursi, supra*, 525 F.2d at 1169. Upon hearing of Hammonds' interest in heroin, Zeigler immediately represented that he could supply heroin for $1,400.00 an ounce. Moreover, he was familiar with the quality of the heroin which was to be sold, which in and of itself supports a positive conclusion as to his propensity. Finally, Zeigler's course of conduct both on October 3, 1973 and October 5, 1973, indicates an unhesitant readiness to complete the transaction. Indeed, if induced, he may be found to have "grasped at the opportunity." *United States* v. *Greenberg*, 444 F.2d 369 (2d Cir.), cert. denied, 404 U.S. 853 (1971). In view of appellant's failure to contradict the evidence as to his predisposition, the District Court properly refused to charge the defense of entrapment.[4]

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[4] Some other relevant evidence which supports predisposition includes the testimony brought out on cross-examination, that appellant was in possession of cocaine at his initial meeting with Hammonds; and testimony by Agent Hammonds that on January 24, 1974, Zeigler suggested cutting the informant out of the picture.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
April 12, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
Assistant United States Attorney,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of April 1976 he served ~~a~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

William J. Stutman, Esq.
233 Spring Street
New York, N. Y. 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
15th day of April 1976

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977